In The Supreme Court of the United States

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner

vs.

KING AND BOOZER, a partnership composed of Tom Cobb King and Simon Elbert Boozer, and UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, In Equity (R. 132-134), is not reported.

The opinion of the Supreme Court of Alabama (R. 140-155) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 572.

JURISDICTIONAL STATEMENT

The decree of the Supreme Court of Alabama was entered on July 29, 1941 (R. 139-140). The petition for writ of certiorari was filed on September 11, 1941 (R. 158), and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Sales Tax Act with respect to sales of tangible personal property to contractors purchasing the same pursuant to a "Cost-Plus-A-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as a part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), and of the statute under which

the appeal was taken from the Assessment (General Acts of Alabama, Extra Session, 1936, page 172), and of the Acts of Congress (Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess. c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508), are printed in the Appendix, *infra*, pp. 97-99.

STATEMENT

Under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), the State of Alabama made an assessment against the respondent, King and Boozer, in the amount of $1,372.75 for sales taxes due by such respondent, covering the period beginning January 1, 1941, and ending March 31, 1941 (R. 9-10), being two per cent (2%) of the gross proceeds of retail sales of tangible personal property made by respondent within the State during such period (Section 2 of said Act). The respondent, King and Boozer, was a lumber dealer at Anniston, Alabama (R. 42). All of the sales involved in said assessment consisted of sales of lumber made by said respondent to Dunn Construction Company, Inc., and John S. Hodgson and Company, who purchased such lumber in their own names and upon their own credit, under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States executed September 9, 1940, for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama (R. 42-47, 77-81).

Such contract was executed under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508, the pertinent provisions of which Acts are shown in the Appendix, *infra*, pp. 97-99.

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * *" at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. 49-50); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five

Dollars ($128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. 50).

The total estimated cost of the construction, exclusive of the contractor's fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS ($3,204,588.00)" as stated in Article I (R. 50).

Article II of the contract, among other things, provides as follows:

"Article II—Cost of the work.

REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at $300 or less shall be classed as tools and shall be classed as

tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. 52) * * * * * * * * * * *

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. 54)

Othen expenditures itemized in Article II are not involved in this case.

Paragraph 3 of Article I of the contract contained the following provisions with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under

article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. 51)

Article V of the contract under the head of "*Special Requirements*" contains, among other provisions, the following:

"1. The contractor hereby agrees that he will:"
* * * * * * * * * * *

"(b). Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c). Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in

excess of $500 shall be made or placed without prior approval of the Contracting Officer." (R. 59-60)

Prior to January 1, 1941, a proposal in writing was submitted by King and Boozer to Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter called the contractors), to sell large quantities of prefabricated lumber at a stipulated price for use by such contractors in the performance of their contract with the United States. This proposal was submitted by the contractor to the Constructing Quartermaster at Fort McClellan for his approval, and was approved by him.

On the trial of this case, it was stipulated and agreed that all of the sales by King and Boozer of tangible personal property which are involved herein were made by it in connection with the performance by the contractor of its contract of September 9, 1940, and that the property was sold, paid for, and reimbursement made therefor in the manner stated with respect to a particular purchase made on January 17, 1941 (R. 40-86).

Pursuant to the proposal submitted by King and Boozer on January 16, 1941, the contractors prepared and submitted to the Constructing Quartermaster a request for the purchase of certain lumber described in Exhibit 2 (R. 77) attached to the statement of facts. Thereafter, on January 17, 1941, the contractors submitted to King and Boozer at Annis-

ton, Alabama, an order for the material described in Exhibit 2 attached to the agreed statement of facts. As shown by a copy of the order attached as Exhibit 3 (R. 78-80) to the agreed statement of facts, such order was signed by the purchasing agent of the contractors and directed that the materials described in the order should be shipped to the United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company, f. o. b. Fort McClellan. The order further provided as follows:

> "This order is placed for the benefit of, and is assignable to, the UNITED STATES GOVERNMENT.
>
> "This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.
>
> "TERMS OF PAYMENT as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice." (R. 79)

The purchase order further provided that bills of lading, etc., must read "United States Construction

Quartermaster at Fort McClellan, Ala. Account of Dunn Construction Co., Inc., and John S. Hodgson & Company."

The purchase order also provided that copies of the invoice should be properly filled out and certified as follows:

> "I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials, or supplies have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. 79-80)

Upon receipt of the purchase order, King and Boozer loaded the material at its place of business at Anniston, Alabama, upon trucks operated by a contract carrier engaged by the seller to transport the lumber to its destination within Fort McClellan. At the time of loading at Anniston, Alabama, the materials were checked and inspected and two separate reports thereof were made, one as shown by report entitled "RECEIVING AND INSPECTION REPORT", a copy of which is attached to the agreed

statement of facts as Exhibit 4 (R. 80). This report was required to be made by the Constructing Quartermaster and was signed by an employee of the contractors and by an employee of the United States representing the Constructing Quartermaster. The other report, entitled "RECEIVING AND INSPECTION REPORT," a copy of which is attached to the agreed statement of facts as Exhibit 4A (R. 81), was a report made to the contractors and by an employee of the United States representing the Constructing Quartermaster.

On January 18, 1941, King and Boozer delivered to the contractor an original invoice, a copy of which is attached to the agreed statement of facts as Exhibit 5 (R. 81), on account of the purchase of the materials described in the purchase order of January 17, 1941. On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractors of the invoice, as appears from a copy of the original invoice transmittal, attached as Exhibit 6 to the agreed statement of facts (R. 82). On January 29, 1941, the Constructing Quartermaster approved the invoice for payment thereof by the contractors, as shown by Exhibit 7 attached to the agreed statement of facts (R. 83).

Thereafter, but prior to February 3, 1941, Dunn Construction Company, Inc., and John S. Hodgson and Company, the contractors, issued their point

check drawn on the First National Bank of Anniston, Alabama, payable to King and Boozer in full payment of the invoice mentioned above, in the amount of $68.23, being the amount of $68.40 less one-fourth of one percent discount, which check, upon presentation, was paid in due course (R. 44-45).

Thereafter, on February 3, 1941, the contractors submitted a voucher, copy of which is attached as Exhibit 8 to the agreed statement of facts (R. 84-86), to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures made by them aggregating $1,991,62, including the expenditure of $68.23 made to King and Boozer as stated above. This voucher did not include any amount for Alabama sales taxes no such tax having been paid by the contractors or by King and Boozer upon such sales.

Thereafter, the Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on February 5, 1941, the voucher was paid by the Finance Officer at Fort McClellan to the contractors by United States Government check (R. 45).

In submitting for payment the voucher mentioned above, the contractors attached thereto their request made to the Constructing Quartermaster for approval of the purchase, bearing approval of the Constructing Quartermaster for the purchase, copies of their purchase order to King and Boozer, the

two Receiving and Inspection Reports, and the invoice of King and Boozer (R. 77-83).

It was further stipulated that Fort McClellan is located upon and constitutes an area in Calhoun County in the State of Alabama, acquired by the United States of America in 1918 by purchase from the individual owners of such lands; that since such acquisition thereof the United States has continuously used the area as a military reservation or fort; and that all of the buildings and improvements mentioned in the contract of September 9, 1940, were constructed upon such area known as Fort McClellan (R. 46-47).

It was stipulated and agreed that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer in all matters pertaining to the contract of September 9, 1940, between the United States and Dunn Constructing Company, Inc., and John S. Hodgson and Company (R. 47); and that such contract was in full force and effect during the period covered by the assessment (R. 41).

It was further stipulated that King and Boozer billed Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes, or for a sum

equal to the amount of the taxes, which had been assessed against King and Boozer and which are involved in the present case, but which bill has not been paid. (R. 47).

In addition to the exhibits attached to the agreed statement of facts, four other exhibits were introduced on behalf of Respondents. These exhibits were numbered one to four, inclusive, and are as follows:

Exhibit B to Statement of Evidence (R. 115-118) is a letter, designated as fixed-fee letter No. 5, from the office of the Quartermaster General of the War Department at Washington, D. C., to Constructing Quartermasters throughout the country, and deals with the relations between the Constructing Quartermasters and the contractor on a cost-plus-a-fixed-fee contract.

Exhibit C to Statement of Evidence (R. 118-122) is a letter dated February 19, 1941, designated as Construction Division Letter No. 101, from the office of the Quartermaster General of the War Department at Washington, D. C., to all zone Constructing Quartermasters, to all local Constructing Quartermasters, to all architect-engineers, and to all construction contractors dealing with the responsibility of local Constructing Quartermasters and their relationship with architect-engineers and construction contractors on projects.

Exhibit A to Statement of Evidence (R. 97-115) is designated as "SUPPLEMENT TO GUIDE FOR CONSTRUCTING QUARTERMASTERS REVISED 1940 COVERING FIXED FEE PROJECTS," and was issued by the office of the Quartermaster General on August 27, 1940. The matter contained in this supplement was stated to be intended as general information only to aid the Constructing Quartermasters and their assistants in connection with fixed-fee contracts covering construction work.

Exhibit D to Statement of Evidence (R. 122-127) is a stenographic report of a conference held in Washington, D. C., on September 6, 1940, with Mr. W. R. J. Dunn, of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of John S. Hodgson and Company, of Birmingham, Alabama, representing the contractors, and Lieutenant-Colonel E. G. Thomas, Mr. H. W. Loving, and Mr. F. J. O'Brien, representing the Government, relating to the construction of Camp McClellan, Alabama.

On May 16, 1941, the respondent, King and Boozer, after having duly protested the making of said assessment executed a bond for the tax and duly perfected an appeal to the Circuit of Montgomery County, Alabama, in Equity, pursuant to Act. No. 154 of the General and Local Acts of Alabama, Extra Session, 1936, page 172 (R. 135).

The United States of America intervened in said cause for the purpose of attacking the validity of said assessment and the statute under which such assessment was made (R. 13-27).

The petition filed by King and Boozer alleged that the assessment of May 15, 1941, was based upon the sales price of tangible personal property consisting of lumber purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company as a agent and instrumentality of the United States, and in connection with the performance by the partnership of a contract with the United States, copy of which was attached as Exhibit A to the petition. It was further alleged that these sales were consummated at Camp McClellan, Anniston, Alabama, an area within the exclusive jurisdiction of the United States. The petition prayed that the assessment be held illegal, null and void on the grounds that the sales were immune under the Constitution of the United States from taxation by the State, that the taxing act of the State exempted the sales from tax, and that the State lacked territorial jurisdiction to impose the tax (R. 27-39).

The State of Alabama filed a demurrer to said petition; and also filed an answer thereto alleging that the assessment was valid for the reason that the sales involved in the assessment were not made to

the United States or to an agency or instrumentality of the United States but were made to Dunn Construction Company, Inc., and John S. Hodgson and Company, who were independent contractors and who were not such an agency or instrumentality of the United States as entitled them to immunity from such tax, that the United States in the contract with the contractors consented to the tax and waived an immunity with respect thereto; that the sales were not consummated within the area of Camp McClellan, and that, even if they were consummated within such area, the United States had released or waived exclusive jurisdiction over such area insofar as the sales and the tax thereon were concerned (R. 31-40).

On May 29, 1941, the United States filed in the Circuit Court of Montgomery County, Alabama, a petition for leave to intervene in the statutory appeal of King and Boozer, on the ground that it was a real party in interest (R. 13-15). On that day the Circuit Court entered an order permitting the intervention of the United States (R. 19). The petition of the United States for leave to intervene was refiled by it as its petition for intervention (R.15).

The petition of intervener set forth the contention that the purchases made by said contractors constituted purchases made by or on behalf of the United States or by an instrumentality or agency of the United States, and were, therefore, constitutionally immune from State taxation, and that the United States had not consented to the imposition of such tax (R. 13-15).

The State of Alabama demurred to such petition and also filed an answer thereto asserting the validity of the assessment and the Act under which the same was made; and alleging that as said sales were made by the respondent to said contractors (a private corporation and a partnership composed of individuals, both engaged in business for private profit), acting in their own names, upon their own credit, and payment for which was made with their own funds, before any reimbursement therefor from the United States under said contract; that the same constituted taxable transactions and were not immune from such a nondiscriminatory State tax; that such purchases were not made by an instrumentality or agency of the United States entitled to assert Federal immunity from State taxation; and that the United States waived any immunity from such tax or with respect to the burden thereof in this: that by the terms of said contract, the contractors were required to pay all applicable sales taxes which might be incurred by them in the purchase of materials, the payment of which taxes constituted a reimbursable expenditure under said contract (R. 19-27).

The trial Court upheld the validity of the assessment (R. 132-134), from which an appeal was taken by the respondent and the intervener to the Supreme Court of Alabama (R. 134-135).

The respondents on appeal assigned various grounds of error, raising the same constitutional

questions set forth in their respective petitions in the trial Court (R. 135-138).

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting, reversing the decree of the trial Court and rendering a decree in favor of the respondents and against the petitioner (R. 140-155).

This case was presented to the Supreme Court of Alabama as a companion to the case of *United States of America, et al, Appellants, vs. John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee*, 3 So. (2d) 582, involving the validity of an assessment of use taxes made under the provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session. 1939, page 96), and in which case the Supreme Court of Alabama rendered a decree on July 29, 1941, reversing and rendering the decree of the trial Court, upon the authority of the ruling in the case at bar, and in which companion case a petition for writ of certiorari was granted by this Court on October, 1941. (Case No. 603).

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In holding that the assessment made against the respondent, King and Boozer, under the provisions of the Alabama Sales Tax Act, was repugnant to the Constitution of the United States.

2. In holding that the sales of tangible personal property made by the respondent, King and Boozer, to the contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, who purchased the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States were constitutionally immune from the Alabama Sales Tax.

3. In holding that such contractors were not independent contractors, but were instrumentalities or agents of the United States, in purchasing the tangible personal property involved in said assessment.

4. In holding that the United States had not authorized or consented to the payment of said tax by such contractors as a part of the cost of the construction.

5. In rendering its final decree of July 29, 1941, reversing the decree of the Circuit Court of Montgomery County, Alabama, in Equity, and in rendering a decree in favor of respondents against petitioner.

SUMMARY OF ARGUMENT

I.

SALES OF TANGIBLE PERSONAL PROPERTY TO CONTRACTORS PURCHASING THE SAME UNDER A COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES ARE SUBJECT TO NONDISCRIMINATORY STATE SALES TAXES:

A. THE NATURE OF THE TAX INVOLVED.

The Alabama Sales Tax Act (Section 11) Appendix, *infra*, pp. 86, 87) imposed a privilege or license

tax upon the person engaged in the business of selling tangible personal property at retail within the State of Alabama, in an amount equal to two per cent (2%) of the gross proceeds of such sales, with provisions requiring the seller to add to the sales price and collect from the purchaser the amount due on account of said tax, and prohibiting the seller from refunding the amount so collected, or from absorbing or advertising that he will absorb or refund said tax or any portion thereof (Section XXVI) (Appendix, *infra*, p. 94). A violation of such provisions for passing on or collecting the amount of such tax from the purchaser is made a misdemeanor (Section XXVII) (Appendix, *infra*, pp. 94, 95).

In Section I (j) of the Act (Appendix, *infra*, pp. 85, 86), sales of building materials to contractors for construction purposes are expressly defined as retail sales.

Lone Star Cement Corp. v. State Tax Com., 234 Ala. 456. 465.

Wood Preserving Corp. v. State Tax Com, 179 So. 254 (1938)

In Section V (Appendix, *infra*, p. 88), sales which the State is prohibited from taxing under the Constitution of the United States, and sales to the State, counties, and municipalities are expressly exempted.

In construing Section XXVI (Appendix, *infra*, p. 94), the Supreme Court of Alabama, in its

opinion in the case at bar held: "The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax." (R. 149).

The tax here involved was assessed against the seller, the Respondent, who was required to pass the tax on and collect it from the vendee, the contractors, as the consumers.

B. THE SALES WERE MADE TO THE CONTRACTORS.

The contract imposed upon the contractors the obligation to furnish the necessary materials (R. 49-50); and pursuant thereto the materials were purchased by the contractors from the respondent, King and Boozer, lumber dealers of Anniston, Alabama, upon orders placed by the contractors in their own names; and the materials were thus sold and delivered to the contractors. The sales were made upon the sole credit of the contractors, and payment therefor was made by the contractors to the respondent, King and Boozer, the vendor, before any reimbursement for such expenditure was received by the contractors from the Government (R. 42-47, 76).

Article V 1 (c) of the Contract (R. 60) contained provisions expressly requiring the contractors to purchase materials in their own names, and in so doing prohibited them from binding or purporting to bind the Government. These provisions were complied with, thereby eliminating any other con-

struction of the transactions or the status of the contractors, than that the sales involved in the asment were made to the contractors, as independent contractors.

Article I 3 of the Contract (R. 51) contained provisions under which materials purchased by the contractors, after delivery, inspection and "acceptance in writing by the Contracting Officer" should vest in the Government, subject to use by the contractors in the performance of the contract. However, no formal "acceptance in writing by the Contracting Officer" was shown to have been executed with reference to such materials.

Such provision did not affect the purchase of the materials by the contractors, but is predicated upon the consummation of such purchase. Such title provision was inserted in the contract primarily for the purpose of eliminating insurance costs, and should be construed in the nature of a security provision, as the vesting of title in the Government afforded protection and security without affecting the contractors' rights to use the material in the discharge of their contractual obligations.

Although the contractors' purchase order stated that it was assignable to the Government, no assignment was shown to have been made with respect to any of the sales involved in the assessment.

C. THE CONTRACTORS IN THE PURCHASE OF MATERIALS WERE INDEPENDENT CONTRACTORS.

The contract imposed upon the contractors an obligation to furnish the necessary materials (Article I of the contract, R. 49-51); and, as required by the contract, such materials were purchased by the contractors in their own names, solely upon their own credit, and paid for with their own funds, before they received any reimbursement therefor from the Government. (R. 42-47, 76).

Although the contract contained various provisions involving supervision, direction, and control of the work by the Government, such provisions are not sufficient to warrant a construction that the contractors in the purchase of materials became agents or instrumentalities of the United States. Cf. *United States v. Driscoll*, 96 U.S. 421 (1877).

Any such construction would be contrary to the express terms of the contract, as well as the terms of the purchase order. (See Article V I. (c) of the Contract R. 60, and the Purchase Order R. 76).

The vendor could not have maintained an action against the United States to recover the purchase price of the materials sold to the contractors, for the reason that the purchases were made by the contractors in their own names and solely upon their own credit. Since there was no privity of contract

between the Government and the vendor, it is obvious that the contractors were acting as independent contractors in purchasing materials.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

The contractors, a private corporation and a partnership, both engaged in business for private profit, are not instrumentalities of the United States, in any technical sense, and therefore, are not entitled to assert governmental immunity from nondiscriminatory State taxation imposed upon them. They are not instrumentalities of the United States, in any technical sense, in purchasing materials for use in the performance of their contract with the United States, as (a) they are not permitted to purchase upon the faith and credit of the United States, or in the name of the United States, or as agents of the United States (Article V 1 (c) of the contract, R. 60), but are obligated to purchase and furnish such materials (Article I 1 of the contract, R. 49) in their own names and upon their own credit; and (b) they do not come within the approved definition of an instrumentality of the United States, in any technical sense. An instrumentality of the Government, in a strict sense, is defined as one "created and controlled" by the sovereign in furtherance of a governmental function. *Metcalf & Eddy v. Mitchell*, ~~279~~ 269 U. S. 514, supra.

The principle under which detailed supervision and control over a contractor or his workers may

create between the owner and the employee of the contractor a relationship of master and servant, with a resulting liability in tort for negligence of the owner, does not apply to actions *ex contractu*, or affect contractual liabilities. *United States v. Driscoll*, 96 U. S. 421, supra, *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 (1927); *United Painting & Decorating Co. v. Dunn*, 137 Ga. 307, 73 S. E. 493 (1912). Neither detailed supervision of the work nor prior approval of the contractor's purchase orders, or subsequent provisions of the contract relating to the conditional vesting of title in the United States, nor the cumulative effect of these circumstances, are sufficient to change the terms of the contract of purchase or the relationship between the vendor and the contractors as vendees, especially in view of the fact that the contract expressly prevented any construction which would impose a contractual liability upon the United States to pay the vendor, notice of which provision was given to the vendor by endorsement on the purchase order of the statement, "This purchase order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 79).

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

So long as the contractors in purchasing materials were not permitted to act as agents for the United

States, and were, therefore, placing such orders and making such purchases as independent contractors, the form or terms of the contract between the contractors and the United States was of no concern to the vendor, and did not affect the contract of purchase. The vendor under no circumstances would be entitled to sue the United States for the purchase price of materials thus sold to the contractors, for the reason that he would be unable to show that the contractors purchased as agents of the United States. The crucial test in determining whether the contractors were such agents would be whether the United States as the principal incurred a direct liability for the purchase. It is difficult to conceive of a case in which the relationship of principal and agent may be established by construction, where the parties concerned expressly stipulated against the liability inherent in the relationship sought to be established.

The difference between a lump sum construction contract and a cost-plus-a-fixed-fee construction contract, so far as it affects the questions involved in this case, is merely a difference of form, and is not deemed sufficient to change the status of the contractor from an independent contractor into an agent or employee.

Under the lump sum contract, all items are considered in advance and together constitute a lump sum, whereas under the cost-plus-a-fixed-fee contract, the parties in advance stipulate the means for

determining the items from time to time which in the end aggregate a lump sum.

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

Since the sales were made to the contractors as independent contractors, and not as agents of the Government, the Court below was clearly in error in applying the decisions of this Court in the cases of *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U. S. 218, supra, and *Graves v. Texas Co.*, 298 U. S. 393, *supra*, to the transactions here involved. The sales in the *Panhandle* and *Graves* cases, *supra*, were made directly to the United States or to admitted instrumentalities thereof. No sales to contractors were involved in such cases.

In the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, this Court expressly distinguished and limited the *Panhandle* and *Graves* cases to the particular facts there involved.

The Court below also erred in attempting to distinguish the case of *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466 (1934), from the case at bar. The decision in the Grosjean case did not hinge upon the fact that the material, gasoline in that case, was consumed by the contractor in the performance of the contract with the Government.

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

Certainly the contractors, as independent contractors, may not object to the tax on the ground of the rate or the aggregate amount of the tax, and it is of no consequence to the State whether the contractors pay the tax out of their fixed-fee or other funds, or whether the contractors receive reimbursement for the amount of the tax in addition to their fee. The fixed fee was based upon the total estimated cost, including materials, labor and services.

While the tax imposed is at the same rate as in the case of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, the tax there approved by the Court was two per cent (2%) upon the gross proceeds of the entire contract, including both materials and labor, whereas the tax here is only upon the purchase of materials.

Therefore, the Government may not object to the tax by reason of the rate or amount. The amount of the tax is measured by the amount of the sale in each instance. Furthermore, in this case, the Government stipulated for the payment of the tax by the contractors, and for the reimbursement thereof as a part of the cost of construction (Article II of the contract, R. 52-54). Such provision was in the form of the contract authorized by the Act of July 2, 1940 (Appendix, *infra*, p. 97), and is valid and binding upon the Government.

There is no difference in the economic burden of a sales tax included by the merchant in the price of goods and a like tax separately added. Any objection to the Alabama sales tax upon such ground would be based upon form rather than substance, and such is not the controlling rule in the consideration of constitutional questions.

II.

The United States Consented To The Tax Upon The Contractors.

While the power of the State to impose a nondiscriminatory tax upon independent contractors is not dependent upon the consent of Congress, nevertheless the legislative history of the Act under which the contract was executed (Act of July 2, 1940, Public No. 703, 76th Congress, 3d Session, c. 508, Appendix, *infra*, p. 97), and of other Acts adopted by the same Congress relating to the National Defense Program (Act of June 11, 1940 (H. R. 8438) Public No. 588, 76th Congress, 3d Session, c. 313), clearly shows that it was the intention of Congress to authorize the construction of various projects through independent contractors.

In the consideration of H. R. 8438, on June 8, 1940, after an extended debate in the House, a proposal to authorize such contractors to act as agents of the Government in the purchase of materials so as to avoid the payment of State taxes in connection

therewith was defeated. Thereafter, in the Act of July 2, 1940, Public No. 703, Congress authorized the execution of the "cost-plus-a-fixed-fee form of contract", the form here involved. From such action, it is clear that Congress intended that the contractors should only be authorized to purchase materials in their capacity as independent contractors. Congress was fully aware of the fact that such form of contract contained the provision for the payment of such taxes by the contractors, and for reimbursement therefor as a part of the cost of construction (Article II 1 (m) of the contract, R. 54).

After such congressional action, two new provisions were inserted in the contract (a) forbidding the contractors from purchasing on behalf of the United States (Article V 1 (c), R. 60), and (b) a provision by which the Government reserved the right to purchase the materials direct and thereby avoid the payment of State taxes thereon (Article II 3, R. 56). However, the failure of the Government to exercise such reserved right to purchase the materials directly constituted a waiver of the immunity which its exercise would have afforded.

Therefore, it is clear that Congress consented to the payment of the tax by the contractors, as independent contractors, and authorized the assumption by the Government of the consequential economic burden thereof, as a part of the cost of construction. The Court below was clearly in error in holding to the contrary.

Furthermore, the action of Congress in passing the Lanham Act (Public Law 137, 77th Congress, 1st Session, c. 260) to assist State and local governments in providing additional services and facilities made necessary in connection with the Defense Program, shows that Congress realized the inability of the State and local governments adequately to meet the needs without Federal aid.

III.

The Sales Involved Were Not Made Within The Military Reservation Of Fort McClellan, Alabama.

The record shows that the materials were inspected and received on behalf of the contractors at the place of business of the vendor, King and Boozer, at Anniston, Alabama, and not upon the Government reservation of Fort McClellan, Alabama (R. 43, 44). Title therefore passed to the contractors before the transportation of the materials to Fort McClellan.

However, by the passage of the Buck Resolution (Act of October 9, 1940. Public No. 819, 76th Congress, 3d Session, c. 787, effective after December 31, 1940), the Alabama Sales Tax Act became effective with respect to such sales even if made within any such Federal Area.

For these reasons, the Court below did not discuss the questions relating to sales upon a Federal reservation.

ARGUMENT

I.

SALES OF TANGIBLE PERSONAL PROPERTY TO CONTRACTORS PURCHASING THE SAME UNDER A COST-PLUS-A-FIXED FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES ARE SUBJECT TO NONDISCRIMINATORY STATE SALES TAXES.

A. THE NATURE OF TAX INVOLVED.

The Alabama Sales Tax Act (Section II, Appendix, pp. 86, 87) imposes a privilege or license tax upon persons engaged in selling tangible personal property at retail within the State, in an amount equal to two per cent of the gross proceeds of such sales; and Section XXVI of the Act (Appendix p. 94) required the seller to add to the sales price and collect from the purchaser the amount due by the seller on account of the tax, and prohibited the seller from refunding or absorbing the tax or any portion thereof. A violation of such provisions is made a misdemeanor under Section XXVII of the Act (Appendix p. 94).

The Court below, in the majority opinion, held: "The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax." (R. 149)

As this Court has held that in determining the constitutionality of the tax, the particular name or designation thereof by a State court or legislature is not controlling (*Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 508), we do not deem it necessary to further discuss the question as to whether the tax should be denominated a seller's tax or consumer's tax, or as a levy imposed upon both the seller and consumer.

In Section I (j) of the Act (Appendix, *infra*, pp. 85, 86), it is provided:

"(j) The term 'sale at retail' or 'retail sale' shall mean all sales of tangible personal property except those above defined as wholesale sales. The quanities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. *Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold.* * * * " (Emphasis added)

In the case of *Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. 456, 217 So. 399 (1937), in construing the same provision which was included in a previous Sales Tax Act (General Acts of Alabama, Extra Session, 1936-37, pp. 125-128), the Supreme Court of Alabama held:

"This subsection clearly discloses a legislative intent to make gross receipts from sales of com-

modities which are consumed by the purchaser or so used as to destroy such commodity as a constituent element of 'tangible personal property,' the resale of which is itself subject to the tax, a basis of computation of the tax."

See also *Wood Preserving Corp. v. State Tax Com.*, 179 So. 254 (1938).

By this provision sales of building materials to contractors, for use in the performance of a construction contract, are defined as retail sales.

By the provisions of Section V (a) (Appendix, *infra*, p. 88) of the Act, proceeds from sales which the State is prohibited from taxing under the Constitution of the United States are exempted from the Act, and in paragraph (b) of said Section (Appendix, *infra*, p. 88), sales to the state, counties and municipalities are likewise exempted.

B. THE SALES WERE MADE TO THE CONTRACTORS.

The contract required the contractors to furnish the materials. Pursuant thereto, the orders were placed by the contractors in their own names, and the materials were delivered to the contractors, who thereafter paid the purchase price with their own funds before receiving reimbursement therefor (R. 47-76).

Neither the approval of the purchase order by the Constructing Quartermaster nor his approval of the invoice prior to the payment thereof by the contractors is of any consequence in determining the fact that the sale was made to the contractors. Under a lump contract, where the specifications for the materials have been previously prepared and agreed upon by the parties, and changes in prices are the sole risk of the Contractor, there is no occasion for approval by the owner of the contractors' various purchase orders for materials.

However, under any cost-plus form of contract, as the owner assumes the risk of the price changes, he usually reserves the right of prior approval of the contractors' purchase orders. It was for this reason that the Government reserved the right of prior approval of the contractors' purchase orders. Such requirement under a cost-plus contract has never been held to justify the construction that the sale was thereby changed to make it a sale to the owner, with the consequent liability which would attach thereto, or that the purchase was effected by the contractor as agent for such owner with the attendant liability of the principal.

The owner was held not liable to a vendor for purchases made by the contractor under a cost-plus contract in the following cases:

Kruse v. Revelson, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 *supra*.

United Painting & Decorating Co. v. Dunn, 137 Ga. 307, 73 S. E. 493 *supra*.

Cf. *United States v. Driscoll*, 96 U. S. 421 (1877)

It is, therefore, obvious that the prior approval of the Constructing Quartermaster was necessarily required, with no intent thereby to make the United States the purchaser. This is further clarified by the provisions in the contract (Article V 1 (c), R. 60) by which the contractor was prohibited from purchasing in the name of the United States, or from binding or obligating the United States for the payment of materials, or from representing that the United States assumed any liability therefor. This provision required the contractor to "make all such contracts in his own name, and not bind or purport to bind the Government or Contracting Officer thereunder."

Although the purchase order stated that it was assignable to the Government, no assignment was shown to have been made with respect to any of the sales involved in the assessment. As no such assignments were made, it needs no argument to show that the sales as consummated were made to the contractors.

The provisions of the contract (Article I, paragraph 3, R. 51) under which, after delivery of the materials and upon inspection "*and acceptance in*

writing by the Contracting Officer," title to materials is to vest in the Government, subject to the contractors' rights and obligations to use the same in the performance of the contract, did not effect the fact that the sale, the incidence of the tax, was to the contractors. Such provision is predicated upon a purchase by the contractors, and has only a subsequent field of operation. This provision was evidently inserted for security purposes, and did not make the transaction a purchase by the United States or for the sole use or benefit of the United States. Furthermore, as this provision was not disclosed to the seller, and was clearly not intended to confer upon the contractors the authority to act as agents, it did not affect the terms of the sale as between the vendor and the purchaser, or the taxable character of the transaction. The record fails to show that any such formal acceptance in writing as contemplated by this provision of the contract was ever executed by the Contracting Officer or by his designated agent, the Constructing Quartermaster.

The agreement between the Government and the contractors that title should contemporaneously or subsequently vest in the Government for security purposes, or to lessen insurance costs, before the material is placed in the structure by the contractors, did not change the fact that the contractors purchased for consumption, and are, therefore, properly construed as the consumer under the Alabama Sales Tax Act. It was nevertheless the ultimate retail sale of the tangible personal property, in fact and in law,

and was so defined by the Act. (Section I (f) Alabama Sales Tax Act Appendix *infra*, p. 84).

Lone Star Cement Corp. v. State Tax Commission, 234 Ala. 465, 175 So. 399, *supra*.

The transactions certainly had their taxable moment. See *So. Pac. v. Gallagher*, 306 U. S. 167 (1938), *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182, 186, 187 (1938), and *Dept. of Treasury of the State of Indiana v. Wood Preserving Corp.*, 85 L. Ed., 817. Also, the transactions constituted taxable incidents under the authority of *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 *supra* and *James v. Dravo Contracting Co.*, 302 U. S. 134 *supra*.

In a pamphlet entitled "Some Commentaries on 'Cost-Plus-a-Fixed-Fee' Contracts with Particular Reference to United States Navy Contracts Under the Bureau of Yards and Docks", by William M. Smith, Special Assistant to the Chief of the Bureau of Yards and Docks, published by the Navy Department on May 20, 1940 (pp. 16, 17), in commenting upon the provisions for the vesting in the Government title to materials, it is said.

"Another item which would also probably have involved a large expenditure was insurance on materials purchased by the contractors for the purposes of the contracts. A special provision was, likewise, recommended and accepted as to this item to

give the Secretary authority to accept materials at any place or places he might deem necessary to minimize insurance costs. The principle of non-insurance of Government property is well established. By taking title to materials at the time possession passed from the seller to the contractors they became Government property at the time and where they happened to be and regardless of whether they had been paid for by the Government."

The title provisions in the form of the contract there under discussion are set forth in the last paragraph of Article 10 of such Contract (page 30 of said pamphlet), and read as follows:

"The Contracting Officer may, in his discretion and on behalf of the Government, take possession at any place he may elect of any material procured by the Contractors for the purpose of transporting it to the site where it is to be used or held for further disposition and may subsequently return such material to the possession of the Contractors for use. Final disposition of any surplus material shall be made as directed by the Contracting Officer. The title to each item of materials, articles, and supplies passes to the Government when acceptance of title is duly authorized or approved by the Contracting Officer."

It is therefore apparent that the purpose of the title provisions was to avoid or minimize insurance costs in certain instances or under special circum-

stances, probably not intended to apply to all material purchased by the contractors and delivered in the ordinary course of the performance of the contract.

As indicated in the above mentioned pamphlet published by the Navy Department, certain administrative officers erroneously conceived the idea that such title provisions would support a construction that the contractors were agents of the Government, that the sale to the contractors should be treated or construed as a direct sale to the United States, and therefore immune from state taxation under the authority of the case of *Panhandle Oil Co. v. Miss. ex-rel. Knox*, 277 U. S. 218, *supra*. However, neither this nor any other provision in the contract warranted a construction that the purchase was made by the Government, or by the contractors as agents.

The title thus attempted to be vested in the Government was not unconditional or absolute, as the contractors retained the beneficial interest in the material which was necessary to enable them to use the materials in the performance of the contract. There were only two incidents necessary to be considered to determine the taxable character of the sales here involved, viz: (1) Were the sales in fact made to the contractors acting in their own names and for themselves? (2) Were sales of building materials to contractors properly defined and classified as retail sales under the Alabama Sales Tax Act. (See Section I (f) of the Alabama Sales Tax Act Appendix *infra*, p. 84).

It is clear that the contractors purchased for consumption or use, and not as dealers for resale. It was within the power of the State to select such sales as a taxable incident, and certainly no taxpayer may evade such a tax by making a collateral agreement with respect to the vesting of the bare legal title for security or other purposes which in no way changed the purpose or character of the purchase. The contractors were not by the title provisons relieved of the obligation to "furnish" the materials for the construction, or to construct the specified improvements upon the land. The contract remained a construction contract, and not a contract for the sale of the materials as tangible personal property.

As the sales involved were unquestionably made to and upon the sole credit of the contractors, the facts are not susceptible of the construction that they constituted purchases by or on behalf of the United States.

C. THE CONTRACTORS IN THE PURCHASE OF MATERIALS WERE INDEPENDENT CONTRACTORS.

Neither any provision of the contract or any incident in its performance, nor the cumulative effect thereof was sufficient to create between the United States and the contractors the relationship of principal and agent in the purchase of materials.

Although the contract provided that the contractors shall be "subject in every detail to his (the Con-

tracting Officer's) supervision, direction and instructions" (Article I, paragraph 1 of the contract, R. 49-50), such detailed control on the part of the United States may not be construed as constituting the contractors as agents of the Government in purchasing materials, especially in view of the specific provisions of the contract which required the contractors to furnish the materials (Article I of the contract, R. 49-51), and to purchase the same in their own names without binding or purporting to bind the United States (Article V, paragraph 1 (c) of the contract, R. 60).

It is clear that such detailed supervision or the right to exercise the same was not intended to be so construed as to override the specific provisions fixing the obligations and capacity of the contractors in purchasing materials. While it is true that when the owner reserves such detailed supervision, direction, and control of the work, or in fact exercises it, an employee of the contractor may be enabled to establish between the owner and himself the relationship of master and servant and thus impose upon the owner a direct liability or responsibility in tort, the principles there involved have no application whatever to the determination of a liability between the vendor and the vendee under a contract of sale. Here the contract was certain. The seller was not mislead. He was advised that he was making a sale to the contractors and to them only. There was no question of an undisclosed principal. The characteristics of the sale were thus

fixed as a transaction or incident subject to the State's power of taxation.

In the following cases, involving the question of liability of the owner for personal injuries resulting from the negligence of the contractor under a cost-plus- contract, the contractor was construed to be an independent contractor:

Ocean Accident & Guarantee Corp. Ltd. v. Kennison, 42 Ariz. 349, 26 Pac. (2d) 113 (1933).

J. B. McCrary Engineering Co., et al v. White Coal Power Co., et al, 35 Fed. (2d) 142 (1929; C. C. A. 4th).

Allen, et al v. Republic Bldg. Co., et al, (Texas Civ. App; 1935) 84 S. W. (2d) 506 (1935).

Crown City Lodge I. O. O. F., No. 395, *et al v. Industrial Accident Commission, et al*, 10 Cal. App. (2d) 83, 51 Pac. (2d) 143 (1935).

Morgan v. Smith, 159 Mass. 570, 35 N. E. 101 (1893).

Whitney & Son Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242 (1898).

Hale v. Johnson, 80 Ill. 185 (1875).

Underwood Contracting Corp. v. Davies, 287 Fed. 776 (1923; C. C. A. 5th).

Carleton v. Foundry & Machine Products Co., et al, 199 Mich. 148, 19 A. L. R. 1141, 165 N. W. 816 (1917).

Alexander v. Mandeville, 33 I11. App. 589 (1889).

Norman v. Middlesex & C. Traction Co., 71 N. J. L. 652, 60 Atl. 936, 18 Am. Neg. Rep. 549 (1905).

Campbell v. Jones, 60 Wash. 265, 20 A.L.R. 671, 110 Pac. 1083 (1910).

Emerson v. Fay, 94 Va. 60, 26 S. E. 386 (1896)

Edmundson v. Coca Cola Co., (Texas Civ. App; 1912) 150S. W. 273.

Bayne v. Everham, 197 Mich. 181, 163 N. W. 1002 (1917)

In the following cases, the owner was held not liable to the vendor for materials purchased by the contractor under a cost-plus contract:

Kruse v. Revelson, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137, *supra*.

United Painting & Decorating Co. v. Dunn, 137 Ga. 307, 73 S. E. 493, *supra*.

In the case of *United States v. Driscoll*, 96 U. S. 421, *supra*, an employee of the contractor attempted to recover wages in a direct action against the United States (*Driscoll v. United States*, 13 C. Cls. 15 (1877)) on the theory that, by virtue of the supervision and control exercised by the United States over the contractor employed under a cost-plus-a-fixed-fee percentage basis, the contractor was the mere agent of the Government in the employment of laborers, and that the United States as a principal became directly liable to such employee. The Court, through Mr. Justice Swayne, held:

> "It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him and did pay him. The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen per cent in addition, was the measure of the amount to be paid to Ordway. The fact that Ordway procured the appellee's receipts, presented his own vouchers to the government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for government. *The hands trusted the former; and, if he had failed to pay them, the loss would have been theirs.* The gov-

ernment having the contractor's receipts, it could not have fallen upon the United States. The acknowledgement of payment by the employes, before getting their money, was wholly their own concern. *Ordway was bound by his contract to have the work done as specified;* and upon every default he was liable for a penalty of $100 a day until he should fulfill his undertaking. *This stipulation is incongruous with the idea of his being an agent and not a contractor. The latter was his relation to the government.* Between himself and the appellee it was simply that of employer and employe.

"The mode, manner, and rate of Ordway's compensation was a matter between him and the United States, and was one with which the appellee had nothing to do. Hence, in this case, it can in nowise affect the rights of the parties. The appellee stands upon exactly the same ground as the employes of any other contractor with the government. It follows that he can have no rightful claim against the appellant." (Emphasis added).

The contractor under a cost-plus contract was construed to be an independent contractor in the following cases:

Baumann, et al v. City of West Allis, et al, 187 Wis. 506, 204 N. W. 907 (1925) (Case in-

volving statute prohibiting agent of a city from having a financial interest in the contract with the city).

Veitch v. Jenkins, 107 Va. 68, 57, S. E. 574 (1907). (Case involving liability of a contractor's employee to land owner on account of defective workmanship).

In the following cases the fact that the contract was on a cost-plus basis instead of on a lump sum basis was not deemed material in determining the relationship of the contractor, who was held to be an independent contractor:

Casement v. Brown, 148 U. S. 615, 13 S. Ct. 672, 57 L. Ed. 582 (1893).

McKenzie Construction Co., v. United States, 64 C. Cls. 645 (1928).

In the case of *Standard Oil Company v. Lee*, 199 So. 325 (1940) (Florida) involving the same form of cost-plus contract as in the case at bar, the contractors were construed to be independent contractors in the purchase of materials. While it is true that such relationship was there stipulated by the parties, such construction of the contract was approved by the Court. The point was necessarily presented for decision, and is in direct conflict with the holding of the Court below in the case at bar.

By the weight of authority, as illustrated in the above cited cases, the contractors in the purchase of materials under a cost-plus contract would be construed as independent contractors, subject to any incidental tax applicable to the exercise by them of such right or privilege thereunder. However, in the case at bar, it is not necessary to determine this relationship by construction, for the reason that the capacity and relationship of the contractors in purchasing materials is specifically and finally fixed under Article V 1 (c) which reads as follows:

> "(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; *make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder.* No purchases in excess of $500 shall be made or placed without the prior approval of the Contracting Officer." (*Emphasis added.*) (R. 60).

The record shows that the contract remained in full force and effect during the period involved (R. 41). Also, it is shown that in the procedure followed by the contractors, in placing orders for ma-

terials, they acted in their own names, and there was endorsed upon each purchase order the following statement:

"This order is placed for the benefit of, and is assignable to, the United States Government. This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 78-80).

This specific provision in the contract and the above quoted endorsements placed upon the purchase orders pursuant thereto are conclusive against any contention that the contractors, in purchasing such materials, were acting in the capacity of agents for the United States. The fact that the contractors were not permitted to bind the United Sates would certainly prevent the vendor from recovering from the United States, as principal, the purchase price for such materials. On the other hand, the principal would be liable if the purchase were shown to have been made by and through an agent, whether the principal in the transaction was disclosed or undisclosed. The crucial test as to whether the relationship of principal and agent existed is whether the purchases by the contractors created any liability from the United States to the vendor of the materials. Since no such liability was created under the express terms of the contract between the contractors and the United States or the contract of purchase between the contractors and the vendors, there is no basis for a finding that the relationship of

principal and agent existed between the United States and the contractors in the purchase of materials. The Court below was clearly in error in holding otherwise.

In considering whether the employees of contractors in the performance of a cost-plus-a-fixed-fee construction contract are subject to the provisions of the Social Security Act (Subsection (a) and (c) of Chapter 9 of the Internal Revenue Code as amended by the Social Security Act Amendments of 1939), the Treasury Department ruled that such employees are employees of an independent contractor, and, therefore, are subject to the provisions of the Social Security Act (Internal Revenue Bulletin No. 11, published March 17, 1941, pp. 5 and 6).

Employees of a contractor in the performance of a cost-plus contract with the United States have been held not to be employees of the Government within the purview of the law and regulations governing hours of labor, leave, and pay of Government employees. (24 Comp. Dec. 671; JAG 242.5, March 26, 1918.) And the Judge Advocate General has held that employees of civilian contractors on a cost-plus-a-fixed-fee basis were not employees of the Government within the purview of the dual pay statutes. (JAG. 248.4, Dec. 5, 1940).

A like status of cost-plus-a-fixed-fee contractors is recognized in a decision by the Comptroller General of the United States (B-18974, August 16,

1941), construing such form of contract on the question of reimbursement of the contractor for uninsured losses resulting from negligence of the contractor or of his employees, and instances in which a Government employee's negligence may have contributed to the loss.

See "Taxation of Government Bondholders and Employees, The Immunity Rule and the Sixteenth Amendment, A Study Made by the Department of Justice, Second Printing," 1939, Chapter III C (2), "The Government Contractor", pages 35, 36, 37 and 38.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

We are not aware of any decision of this Court, or any other authority, which supports the contention that such a private corporation or partnership as the contractors here involved, operating for private profit, should be construed as instrumentalities of the United States, in a technical sense, and, therefore, immune from State taxation.

As expressed by Mr. Justice Douglas in the case of *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358 (1939), "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter."

And as stated by Mr. Justice Holmes in the case of *Baltimore Ship Building & Dry Dock Co. v. Baltimore*, 195 U. S. 375 (1904), " * * * it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States * * *." (See *Fidelity and Deposit Co. v Pennsylvania*, 240 U. S. 319 (1916).)

It thus seems to be firmly established that neither a private corporation nor a private partnership or individual operating for gain may be construed to be an instrumentality of the United States, in any technical sense, and, therefore, entitled to the implied constitutional immunity of the Government from State taxation.

Apparently the most accurate definition of an instrumentality of the United States, or an instrumentality of the State, in a strict or technical sense, is that stated by Mr Justice Stone (now Mr. Chief Justice Stone) in the case of *Metcalf & Eddy v. Mitchell*, 269 U. S., *supra*, where it was held that such an instrumentality must be both "created and controlled" by the sovereign "exclusively to enable it to perform a governmental function".

And an independent contractor was there held to be excluded as such an agency of either sovereign; and this holding was reiterated in *James v. Dravo Contracting Co.*, 302 U. S. 134, 157, 158, *supra*, and appears to be a sound and settled principle of constitutional law.

As illustrated in the case of *Clallam County v. United States*, 263 U. S. 341, (1923) where the Spruce Production Corporation, a corporation organized under the laws of a State, was held to be an instrumentality of the United States entitled to enjoy government tax immunity, it appeared that the corporation was organized and operated exclusively for governmental purposes, in furtherance of the National Defense, and not for private profit, the entire stock being owned by the Government.

In commenting upon the nature of such instrumentality involved in that case, Mr. Justice Holmes, speaking for this Court, said: " * * * here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account."

An instrumentality of the United States in its technical sense—one which is clothed with the immunity of its sovereign—as recognized and defined by this Court, is some legal entity, usually in the form of a corporation or association, created and controlled by the Government in furtherance of a governmental purpose, such as the national banking associations, Reconstruction Finance Corporation, Home Owners Loan Corporation, Federal Land Banks, and many other like corporations or organizations. As in the case of national banks, the con-

trol of the sovereign is not necessarily extended to ownership.

We are not aware of any private corporation, partnership, or individual, or business conducted thereby for gain, which has been recognized by this Court as constituting a governmental instrumentality in its technical sense, either State or Federal.

While this rule does not prevent the sovereign, either Federal or State, from making use of private corporations, partnerships and individuals, or contracting for their service in furtherance of governmental purposes or functions, it is here that the dividing line is drawn under the doctrine of intergovernmental tax immunity; and the private corporation, partnership, or individual operating for private profit is left subject to nondiscriminatory taxation imposed by the other sovereign. The mere fact that the tax results in imposing an indirect economic burden upon the sovereign does not affect its validity. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra; James v. Dravo Contracting Co.*, 302 U. S. 134, *supra; Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466, *supra; Alward v. Johnson*, 282 U. S. 509 (1931); *Graves v. New York, ex rel. O'Keefe*, 306 U. S. 466, (1939); *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

In the case of *United States v. Query, et al*, 37, Fed. Supp. 972, decided April 1, 1941, (affirmed without opinion by the Fourth Circuit Court of Appeals June 27, 1941), the court held that as Army

Post Exchanges and other similiar organizations were created pursuant to various Acts of Congress, were not operated for private profit, and were subject to regulation and control by the Government, they constituted instrumentalities of the United States, immune from State taxation.

In the following cases which involved a construction by the Federal Courts of the doctrine of intergovernmental tax immunity, the contractor with the State was held liable for Federal tax, even though it was admitted that the immunity would have applied if the activity had been performed directly by or in the name of the State:

Metcalf & Eddy v. Mitchell, 269 P. S. 514, *supra.*

Kreipke v. Commissioner of Revenue, 32 Fed. 2d 594, (1929) (Contractor under cost-plus contract with a State.)

Blair, Comm. of Revenue v. Byers, 35 Fed. (2d) 326 (1929).

Helvering v. Clairborne-Annapolis Ferry Co., 93 Fed. (2d) 875 (1938).

Comm. of Internal Revenue v. Modjeski, 75 Fed. (2d) 468, cer. den. 295 U. S. 764.

Brooklyn Ash ~~Removel~~ Removal Co., Inc., v. United States, 80 Cls. 770, ~~16~~ 10 Fed. Supp. 152. cert. den. 295 U. S. 752 (1935).

Cf. Helvering v. Gerhardt, 304 U. S. 405, *supra*.

The failure of the Court below, in the case at bar, to give effect to this well defined principle in the doctrine of intergovernmental tax immunity was erroneous; and unless such decision is reversed by this Court the principle of intergovernmental tax immunity will be so extended as to seriously impair the revenue of the other sovereign affected. Furthermore, it is inconceivable that this Court would approve one rule with respect to such contractors employed by the Federal government and a different rule with respect to contractors employed by a state under the same form of contract in furtherance of a governmental function.

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

The mere form of the contract does not affect the right of the State to impose a non-discriminatory tax upon the contractors.

The only argument to sustain any contention that a different rule should be applied in determining the question of tax liability of a contractor under a cost-plus contract from that of a contractor under a lump sum contract, is that, by virtue of the direction and supervision imposed upon the contractor under the

cost-plus contract, the relationship of principal and agent is created. This construction is untenable. It is contrary to the general rules applicable in determining a contractual liability, and, furthermore, it is in direct conflict with the specific provisions of the contract which prohibit the contractor from purchasing materials in the capacity as an agent for the United States, and compel him to buy in his own name, upon his own responsibility (Article V 1 (c) of the Contract, (R. 60) and with his own funds, and to actually pay therefor before submitting a bill for reimbursement for the expenditures incurred in the purchase of materials, plus the State taxes applicable thereto. If the contract were silent in these respects, it might be contended that the relationship of principal and agent arose, and that the Government incurred a direct liability to the vendor; and it was doubtless for such reasons that the express provision to the contrary was inserted in the contract, and the contractor was required to so warn the vendor. These circumstances fixed the relative rights of the parties, and stamped the transactions as incidents clearly subject to State taxation.

If the United States had made the purchase in its own name, or had authorized the contractors to purchase in the name of the United States, as agents therefor, or in the name of the contractors as agents for the United States, the transactions would have been immune from taxation, and would also have been expressly exempt under the terms of the Alabama Sales Tax Act (Section V (a), Appendix *infra*, p. 88).

In the cost-plus-a-fixed-fee form of construction contract, the aggregate amounts paid by way of reimbursement, plus the fixed fee (the contractor's profit upon the entire contract), together constitute a lump corresponding to the lump sum stipulated in contracts referred to as lump construction contracts.

In the one case, the lump sum is known at the time and is, therefore, stipulated, whereas in the other case the factors which will constitute the lump sum are agreed upon and, thereby, the parties have legally agreed upon the separate items of cost or the manner for determining the amount thereof which in the aggregate constitute a lump sum. The reason for the arrangement in this case was to expedite the construction by and through an independent contractor, without awaiting the completion of final plans and specifications (1), even though it necessitated a greater degree of supervision, direction and control of the work, and required the approval from time to time of each of the contractors' purchase orders.

In the case of *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137, *supra*, the Court held:

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(1) Pamphlet entitled "SOME COMMENTARIES ON 'COST-PLUS-A-FIXED-FEE' CONTRACTS" by William M. Smith, published by Government Printing Office, 1940, p. 2; see statement of Secretary of Navy in "HEARING BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES, SEVENTY-SEVENTH CONGRESS FIRST SESSION ON THE NAVY DEPARTMENT APPROPRIATION BILL FOR 1941", pp. 16, 17.

> "We are unable to see any distinction in the relationship created by the cost plus $800 contract and the relationship that would have been created by a contract wherein the Golden Building Company had agreed to build the building for $20,800. The fact that the cost of the labor and material was not definitely determined in advance and the amount of the profit was definitely determined in advance does not distinguish the character of the contract from that of a contract where the cost is attempted to be determined in advance, since a definite basis was agreed upon by which the cost was to be ascertained."

In the case of *Carleton v. Foundry and Machine Products Company*, et al, 199 Mich. 148, 19 A. L. R. 1141, 165 N. W. 816, *supra*, in holding that the relationship under a cost-plus contract was that of an independent contractor, the Court said:

> "We may take judicial notice that the arrangement of paying cost, plus a percentage as a contract price for a completed job, is growing in favor, and is becoming a common plan adopted by contractors in place of a lump sum payment. The federal Government has let contracts involving the expenditure of enormous sums of money on this plan. The change is only in the method of computing payment. There is no change in the relation of the parties from that which exists where

> the payment is a lump sum. The manner of of computing payment for the completed job is not controlling; a change in this regard does not convert an independent contractor into an employe, either at common law or within the meaning of the act."

See *Casement v. Brown*, 148 U. S. 615, *supra*.

Cf. *McKenzie Construction Co. v. United States*, 64 C. Cls. 645, *supra*.

Cf. *United States v. Driscoll*, 96 U. S. 421, *supra*.

If such vendor should attempt to institute a direct action against the United States to recover for materials sold to the contractor, it is assumed that the Government would interpose the defense that the purchase was made by the contractor as an independent contractor and not in the capacity as an agent for the United States; and that the vendor was so advised in advance to prevent any misconstruction of the relationship; and it is inconceivable that the Court in such action would shield the United States from liability, but for the purpose of determining questions of State taxation, would uphold the contrary contention that the purchase was made by the contractors as agents for the Government.

This illustrates the point that the contention made by the Government in the case at bar is inconsistent

with the specific provisions of the contract, the form of which was expressly authorized and approved by Congress (Public No. 703, Appendix, *infra*, p. 97).

Likewise, the certificate required by the Government to be endorsed on the contractors' invoice, to the effect that no sales tax is included therein (R. 79-80), was contrary to the letter and spirit of the contract. (Article V 1 (c) of the contract R. 60).

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

We are not here dealing with a case involving an attempt to impose a tax upon the United States or an admitted instrumentality thereof.

It is, therefore, unnecessary to discuss the general rule that the United States and its instrumentalities are constitutionally immune from State taxation.

The Court below was clearly in error in applying the decisions of this Court in the case of *Panhandle Oil Co. v. Miss. ex rel, Knox*, 277 U. S. 218, *supra*, and *Graves v. Texas Co.*, 298 U. S. 393, *supra*, to the case at bar, for the reason that the sales involved in such cases were made directly to the United States, or to admitted instrumentalities thereof, whereas the sales here involved were shown to have

been made to independent contractors. In the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, the decisions in the *Panhandle* and *Graves* cases were distinguished and expressly limited to the particular facts there involved, namely, direct sales to the United States or its instrumentalities. The holding of the Court below is in conflict with the decisions of this Court in the cases of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra*, *Trinityfarms Const. Co. v. Grosjean*, 291 U. S. 456, *supra*, *Alward v. Johnston*, 282 U. S. 509, *supra*, *Wheeler Lumber Co. v. U. S.*, 281 U. S. 572 (1930); *United States v. Driscoll*, 96 U. S. 421, *supra;* and *Silas Mason Co. v. Tax Com.*, 302 U. S. 186, *supra*, and is also in conflict with the doctrine of intergovernmental tax immunity as defined by this Court in numerous cases. See *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, *supra*, *Helvering v. Gerhardt*, 304 U. S. 405, *supra*.

The Court below attempted to distinguish the case of *Trinityfarms Const. Co. v. Grosjean*, 291 U. S. 456, *supra*, from the facts of the case at bar on the ground that the contractor is subject to the tax in the purchase of his own equipment to be used by him in the construction, and on the supplies purchased by him to be consumed by him in the performance of the contract, but that a different rule should obtain with respect to materials which are to go into the construction and thus will ultimately be acquired by the Government. We do not construe that

such distinction in use was the basis of the decision by this Court in the *Grosjean* case. The basis of the decision of this Court in the *Grosjean* case, as we construe it, was that the incidence of the tax was the sale to an independent contractor, that the tax was nondiscriminatory, and the economic burden upon the Government was indirect and consequential; and that neither the rate nor aggregate amount of the tax was deemed by the Court to constitute such an interference with Government, or to so impair the efficiency of the contractors as to be repugnant to the constitution of the United States. These were the same reasons which formed the basis of the approval of the tax in the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*.

The *Panhandle* and *Graves* cases have been treated or construed by various Courts(2) and Departments of Government(3) as having been overruled by this Court; although the Comptroller General of the United States, the Navy Department and War Department apparently take a contrary view(4).

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(2) California *Western Lithograph Co. v. Board of Equalization*, 11 Cal. (2) 156, 78 P. (2) 731 (1938); Florida, *Standard Oil Co. v. Lee*, 142 Fla. 906, 199 So. 325 (1940); *North Dakota, Federal Land Bank v. De Rochford*, 69 N. D. 382, 287 N. W. 522.

(3) Opinion of Attorney General of the United States, August 5, 1939 (Vol. 3, Op. 85) pp. 4-5. Taxation of Government Bondholders and Employees, The Immunity Rule and the Sixteenth Amendment, A Study made by the Department of Justice, Second Printing, p. 62 n. 228 in which such cases were construed to be narrowly limited and probably overruled by *James v. Dravo Contracting* Co., 302 U. S. 134. Cf. Treasury Department, Internal Revenue Bulletin, No. 11, March 17, 1941, pp. 4 and 5.

(4) Pamphlet entitled "Some Commentaries on 'Cost-Plus-A-Fixed-Fee' Contracts" by William M. Smith, published by Government Printing Office, 1940, p. 17.

Counsel for the Government attempt to distinguish the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, upon the ground that the tax there applied to proceeds which had been disbursed to the contractor, in other words that the incidence of the tax was the receipt by the contractor of proceeds earned in the performance of the contract, whereas, in the case at bar, if the contractors paid the tax, the Government would be called upon to reimburse the contractors for the exact amount of the tax, and, therefore, that the tax should be construed as imposing a direct burden upon the Government; and while admitting that the contractors' fixed fee is subject to a nondiscriminatory State tax thereon, such counsel contend that any such tax should be limited in its measure to the amount of the contractors' fixed fee, and should exclude the amount of his purchases of materials or proceeds received by way of reimbursement for such expenditures. Such contention is directly in conflict with the principle decided in the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*.

In the case at bar, the independent contractor is required to make his own purchases with his own funds, a privilege or incidence clearly subject to nondiscriminatory State taxation. It is of no consequence to the State whether the contractor pays such tax out of his fixed fee which, as expressed by the Secretary of the Navy, Mr. Knox, before the Subcommittee of the House Committee on Appropriations, "is based on an estimated cost determined by

negotiation in advance"(5) or whether, by virtue of the contract, the contractor is entitled to reimbursement therefor in addition to his fixed fee. This Court has in no case so limited or defined the taxing power of the State. The State is not limited to a choice between the imposition of net income taxes and gross receipts or sales taxes. Since each of these taxes has a distinct field of operation, the State may include both as a part of its system of State taxation.

As expressed in the case of *Witherspoon v. Duncan*, 4 Wall. 210, 217 (1867): "It is not the province of this court to interfere with the policy of the revenue laws of the States * * * * *."

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

The validity of the tax is not dependent upon whether the contractor is required to pay the tax out of his fixed fee (which was stipulated on the basis of the total estimated cost of the construction, in-

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(5) See Section 4 (a) of Act of April 25, 1939 (Public No. 43, 76th Congress, 53 Stat. 590-592), where it is provided: "Such fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of the Navy. Changes in the amount of the fee shall be made only upon material changes in the scope of the work concerned as determined by the Secretary of the Navy, whose determination shall be conclusive." See also Preliminary Conference with Contractors, Exhibit D (R. 122, 126), where it was stated: "The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs * * *."

cluding materials and labor), or whether the contractor may legally obtain additional payments to reimburse him for payment of the tax, or whether such reimbursement provisions are valid or invalid. As the contractors in purchasing materials were independent contractors, the power of the State to impose taxes upon them is only limited by the principle that the tax may not be discriminatory, or constitute such an excessive burden as would meet the condemnation of this Court on the ground that it materially interfered with the performance of the contract. (See *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, and *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, *supra*). See also dissenting opinion of Mr. Justice Holmes in the *Panhandle Oil Company v. Miss. ex rel. Knox*, 277 U. S. 218, *supra*.

Under these accepted principles, it is pertinent to consider the amount of the tax and the resulting economic burden whether imposed under a lump-sum or cost-plus contract, or upon the gross proceeds of the contract. On examination of the tax here involved, although it is at the same rate as approved by the Court in the cases of *James v. Dravo Contracting Company*, 302 U. S. 134,, *supra*, and *Silas Mason and Co. v. Tax Comm.*, 302 U. S. 186, *supra*, it excludes any percentage upon labor or service, and is, therefore, less burdensome. As expressed in the dissenting opinion of Mr. Justice Brown in the Court below in the companion case of *United States, et al v. John C. Curry*, etc. 3 So. (2d) 582, the resulting burden, if any, imposed upon the United States by

virtue of the tax imposed upon the contractors is not a statutory exaction, but is a contractual liability. Such liability was duly authorized, was voluntarily assumed, and is valid and binding upon the Government.

Garford Motor Truck Co. v. United States, 57 C. Cls. 404 (1922).

Wm. Cramp & Sons Ship & Machine Building Co. v. United States, 72 C. Cls. 146 (1931).

Asiatic Petroleum Co. (N. Y.) Ltd. v. United States, 78 C. Cls. 696 (1934).

Under the provisions of Article II and particularly Article II(m) of the contract (R. 52-54), the Government stipulated that the contractors should be required to pay such taxes as expenditures constituting a part of the cost of work or construction, to be reimbursed to the contractors as other expenditures included in the cost. The tax, therefore, as to the Government, constitutes an indirect or consequential economic burden contractually assumed.

As the tax is nondiscriminatory and is measured by the amount or extent of the sales involved, it is clearly valid as a levy imposed upon independent contractors, regardless of the form or terms of the contract.

In a statement of policy contained in a memorandum from Acting Attorney General, Francis Biddle,

to John H. Hedren, Chairman of the Committee on Uniform Sales Taxation, National Association of Tax Administrators, released June 8, 1941, among other things, it was said:

> "At least until the situation receives further clarification, no attempt will be made by this Department to challenge the validity of state sales taxes levied solely on vendors, which they are legally empowered to absorb as part of the sales price, or to contest gross receipts taxes or any other non-discriminatory state taxes levied upon the fees paid by the Government to contractors. Where the tax is upon the vendor or upon the earnings of the contractor, the Federal Government itself is not the subject of state taxation and the incidental economic effect of such taxes upon the Federal Government should not be the basis of immunizing the individual."

From this, it is obvious that the attack here made upon the Alabama sales tax upon the contractors' purchases of materials is not on account of the economic burden thus cast upon the Government under the reimbursement provision of the contract, but is based upon the complaint that the vendor, instead of absorbing the tax and thereby passing on the tax as an increase in the price, is required to pass the tax on as tax, by adding to the price an amount equal to the amount of the tax. This objection is based upon form instead of substance. In considering the constitutional questions here involved, in which the

States are so vitally concerned, we believe that the realistic effect and substance of things should control over matters of mere form. Cf. *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 508, *supra*.

II.

The United States Consented To The Tax Upon The Contractors.

Although the power of the State to impose a nondiscriminatory tax upon independent contractors employed by the Government is not dependent upon the consent of Congress; and while it is not conceded that the contractors are instrumentalities of the United States entitled to assert its implied constitutional immunity from State taxation, nor that Congress possesses the power to exempt private corporations, partnerships or individuals, operating for gain, from the payment of their share of State taxation, it is pertinent to trace and consider the history of the cost-plus form of contract, and the legislation under which the contract here involved was expressly authorized. Such form of contract appears to have been first authorized in the Act of April 25, 1939 (Public No. ~~703~~ 77, 76th Congress, ~~2d~~ 1st Session, c. ~~508~~ 57).

A copy of the form of contract executed pursuant to the Act of April 25, 1939, is shown in the above mentioned pamphlet published by the Navy Depart-

ment in May, 1940, and copies of all of such contracts were required to be reported annually by the Secretary of the Navy to Congress (Section 4 (e) of the Act of April 25, 1939). There are the following points of difference between the original contract and the contract in the case at bar, viz: (1) The original form required the contractors to purchase materials, but contained no specific provisions in the contract prohibiting the contractors from binding or purporting to bind the Government in purchasing materials. This provision was added in the contract here under consideration (Article V 1 (c), R. 60). (2) The original form of such contract contained no provision reserving to the Government the right to make direct purchases of materials in such manner as to be immune from State taxation. The contract here under consideration in Article II, paragraph 3, expressly reserves to the Government the right to furnish materials (R. 56).

Article 27 (o) of the original form of contract is substantially the same as Article II (m) of the present contract relating to payment of State taxes as a part of the cost of the work, and providing for reimbursement of the contractors for such expenditures.

Certain officers of the Government had ruled that the contractors in purchasing materials were acting as agents of the United States, and that the transactions, therefore, were immune from taxation, relying upon the case of *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U. S. 218, *supra*, although such case

had been limited and distinguished, if not overruled, by the decision of this Court in the case of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra.*(6)

Notwithstanding such construction by the administrative officers of the Government, certain States demanded the payment of sales taxes from such contractors. To meet this situation, Congress was requested to authorize the Secretary of Navy to designate the contractors as agents for the United States in purchasing materials, and to exempt them from Federal, State and local taxation.(7)

In the consideration of H. R. 8438, (Act of June 11, 1940, Public, No. 588, 76th Congress, 3d Session, c. 313), relating to construction in furtherance of the National Defense Program, the Senate adopted Amendment No. 120 which read as follows:

> "The provisions of section 4 of the act approved April 25, 1939 (53 Stat. 590-592) shall be applicable to all public-works and public-utilities projects mentioned in this act: Provided that all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held

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(6) Commentaries on "Cost-Plus-a-Fixed Fee" Contracts with Particular Reference to United States Navy Contracts Under the Bureau of Yards and Docks.

(7) Hearings before Senate Sub Committee of the Committee on Appropriations, Navy Department Bill for 1941, pp. 16, 17.

to be agents of the United States for the purposes of such contracts and all purchases under such contracts shall be exempt from Federal, State, and local taxes."

Upon the consideration of this amendment in the House on June 4, 1940, there was an extended debate thereon particularly with respect to the proviso therein, its purposes and effect (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539). Finally the original Senate Amendment No. 120 was rejected and in lieu thereof the House adopted the following amendment in which the Senate concurred:

"The provisions of section 4 of the act approved April 25, 1939 (53 Stat. 590-592), shall be applicable to all public-works and public-utilities projects mentioned in this act, regardless of location."

In the House Debate[8] the opponents of the proposal embodied in the proviso vigorously contended that the proposal, if adopted, would interfere with State and local revenues needed to provide additional roads, schools, and other facilities and protection made increasingly necessary as a result of the establishment of military camps and other defense projects; and, that it was a dangerous precedent which might result in an aftermath of numerous claims against the Government.

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(8) Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539.

Evidently realizing that Congress was without power to merely exempt contractors (private corporations and individuals) from the payment of nondiscriminatory State taxation, so long as they continued to purchase materials as independent contractors, it is significant that the authority requested in Senate Amendment No. 120 to H. R. 8438 was to change the *status* of the cost-plus-a-fixed-fee contractors to that of agents of the Government in making purchases of materials, and thus authorize them to purchase materials in the name of the Government or as agents of the Government with the resulting immunity from taxation. But this requested authority was denied.

After the defeat of this proposal, the Congress passed the Act of July 2, 1940, Public No. 703, 76th Cong., 3d. Sess., c. 508, under which the "Cost-Plus-A-Fixed-Fee Construction Contract" involved in this case was expressly authorized to be executed. The form of contract executed in this case is shown to be C. P. F. F. Form No. 1, approved by the Assistant Secretary of War July 12, 1940, and in view of the denial by Congress of the authority to authorize the contractors to purchase materials as agents for the Government, a provision was incorporated in the contract to prohibit the contractors from purchasing as agents or even from purporting to bind the United States or the Contracting Officer, (Article V 1 (c) of the contract R. 60); and at the same time another new provision was inserted, reserving the right of the Government to fur-

nish any materials under the contract (Article II, paragraph 3 of the Contract R. 56). The contract retained therein in substance the original provisions for the payment by the contractors of State and local taxes required to be paid by them in the purchase of materials, treating such taxes as expenditures constituting a part of the cost of construction, reimbursable as other items of cost (Article II and Article II (m) of the contract R. 52-57).

In view of the decision of this Court in *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra*, and numerous decisions of State and Federal Courts based thereon, and the denial by Congress of authority to designate the contractors as agents of the Government in purchasing materials so that immunity from State taxation might be conferred upon them, it was no doubt necessary, and we assume the contractors demanded that the tax provision, Article II (m), be included in the contract. However, in order to provide for some means by which materials might be purchased without the payment of such State taxes, the Government also inserted the provision reserving the right to make direct purchases of materials (Article II, paragraph 3 of the Contract, R. 56). But, the failure of the Government to exercise such reserved right under the contract to purchase materials directly, immune from State taxation, constituted a waiver of any right to claim or assert such immunity with respect to the purchases involved in this case.

The action of Congress in expressly authorizing the execution of such form of contract, in the light of its debates and hearings thereon, and its denial of requested authority thereunder to authorize the contractors to act as agents for the Government in purchasing materials, reveals an unmistakable intent of Congress to leave the contractors in their status as independent contractors subject to State taxation; and such Congressional action was sufficient to authorize the Secretary of War to retain in the contract the provisions including such taxes as an item of expenditure constituting a part of the cost of construction, to be paid by the contractors, and thereafter to be reimbursed to them, not as taxes, but as an expenditure included in the total cost of construction.

The contract and the tax payment and reimbursement provisions thereof are valid, and were as specifically authorized as if Congress in the Act of July 2, 1940 (Public No. 703), had expressly mentioned the particular contract involved in this case. Furthermore, if consent of Congress either for the imposition of the tax upon the contractors or the inclusion thereof as one of the reimbursable items comprising the total cost of construction under the contract was necessary, such consent was embodied in the Act of July 2, 1940 (Public No. 703), under which the contract was executed.

The form of contract and the relationship of the contractor which was approved and authorized by

the Congress clearly contemplated that the contractors would be independent contractors, subject to all of the disabilities and incidents of State taxation, except, of course, there was no implication that Congress consented to or waived any right of the contractors or the Government to object to a discriminatory tax. Therefore, if the contract executed pursuant to the Act of July 2, 1940 (Public No. 703), is subject to the construction that it authorized the contractors to purchase materials as agents for the United States Government, and that a relationship of principal and agent was thus created, the contract would be invalid as in conflict with the clearly expressed intent of Congress in its authorization.

In determining the proper construction and the legislative intent of an Act, the Court may consider its history, as well as that of companion or related measures, especially when enacted at the same legislative session. *United States v. Katz*, 271 U. S. 354, 557; *Wisc. Railroad Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 588, 589; *Duplex Co. v. Deering*, 254 U. S. 443, 474, 475; *Penn. R. R. v. International Coal Co.*, 230 U. S. 184, 198, 199.

Extended debate upon a statutory provision which was omitted from an Act on final passage has been held to evince an intent that the Act should be construed as not making the change contemplated by the omitted provision. *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320, (1934).

We assume that the Court will take judicial knowledge of the unprecedented National Defense Program, and the burden thus cast upon the States and local Governments to provide the governmental services demanded, particularly for schools, roads, fire and police protection, and measures affecting public health. As an illustration, we cite information from the State Department of Education with respect to increase in school enrollment in 1941 over 1940 in Talladega County, Alabama, in which County a large munitions plant is being constructed at Childersburg, Alabama. (See letter from Dr. A. H. Collins, State Superintendent of Education, Appendix, *infra*, pp. 82, 83).

Realizing the inability of the local Governments adequately to cope with the situation, Congress adopted the Lanham Act, approved July 28, 1941 (Public Law 137, 77th Congress, 1st Sess., c. 260),

appropriating $150,000,000 to be expended to accomplish its purposes.(9)

III

THE SALES INVOLVED WERE NOT MADE WITHIN THE MILITARY RESERVATION OF FORT McCLELLAN, ALABAMA.

The record shows that the orders were sent to the respondent, King and Boozer, whose place of business was at Anniston, Alabama, not upon the Government reservation; and the materials were inspected and received at the place of business of the vendor, after being loaded upon the trucks of a contract carrier, and were subsequently transported by

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(9) The purposes of this Act are set forth in Title II, Sections 201 and 202, the pertinent provisions of which are:

"Sec. 201. It is hereby declared to be the policy of this title to provide means by which public works may be acquired, maintained, and operated in the areas described in section 202. As used in this title, the term 'public work' means any facility necessary for carrying on community life substantially expanded by the national-defense program, but the activities authorized under this title shall be devoted primarily to schools, waterworks, sewers, sewage, garbage and refuse disposal facilities, public sanitary facilities, works for the treatment and purification of water, hospitals and other places for the care of the sick, recreational facilities, and streets and access roads.

"Sec. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage— * * * "

such means to a point within Fort McClellan (R. 43, 44). It is our contention that the sale was therefore consummated before the transportation from Anniston to Fort McClellan.

By the passage of the Buck Resolution (Public No. 819, 76th Congress, 3d Session, c. 787), effective after December 1, 1940, any objection to the imposition of State sales taxes within any Federal area are expressly removed, and as the sales involved occurred subsequently to the effective date of such Act, any question which might have arisen as to the application of the Sales Tax Act with respect to sales made within a Federal area has been eliminated. For such reasons, it is evident that the Court below did not deem it necessary to discuss any objection to the tax upon the ground that the sale was made within an area over which the State had ceded to the United States exclusive jurisdiction.

CONCLUSION

As the tax was nondiscriminatory, and the contractors purchased the material as independent contractors, and were not instrumentalities of the United States, they were not immune from nondiscriminatory State taxation; and for the reason that the Government, with the consent and approval of Congress, voluntarily stipulated in the contract for the payment of the tax by the contractors, and for the reimbursement thereof, as an expenditure constituting a part of the cost of construction, and the Government failed to exercise its reserved right to purchase the materials directly, the tax imposed was within the taxing power of the State, and is not repugnant to the Constitution.

The holding of the Court below to the contrary was clearly erroneous, and its decision should be reversed by this Court.

Respectfully submitted,

THOMAS S. LAWSON
Attorney General of Alabama

JOHN W. LAPSLEY
Assistant Attorney General

J. EDWARD THORNTON
Assistant Attorney General

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Of Counsel

APPENDIX

STATE OF ALABAMA

DEPARTMENT OF EDUCATION

MONTGOMERY

October 6, 1941

Honorable T. S. Lawson
Attorney General of Alabama
Montgomery, Alabama
Dear Mr. Lawson:

In answer to your inquiry concerning the effect of the National Defense Program on the public schools of Alabama, permit me to state the following:

1. The location of new defense industries and military establishments in Alabama has greatly increased the educational load in several defense areas. Official reports are not available on 1941-42 school enrollment in all defense areas but preliminary reports indicate considerable increases in certain areas. For instance, reports from Talladega County indicate an increase in enrollment of 1,300 children, or 25 per cent, in that county. This increase in enrollment is exclusively due to the location of the powder plant in the Childersburg area of Talladega County. Increases in attendance are also indicated in other areas as follows: Mobile,

Selma, Montgomery, Sheffield, Huntsville, and Anniston. These increases in attendance call for increased expenditures for housing, maintenance, and operation.

2. The Federal Defense Program has caused an increase in the cost of living to teachers throughout the State. Sufficient funds are not available to boards of education to increase teachers' salaries in order to take care of increased living costs.

3. The average school term of Alabama is the shortest in the Nation with the exception of Mississippi. The average salary paid Alabama teachers is the lowest in the Nation with the exception of Arkansas and Mississippi.

All available evidence indicates that the public schools of Alabama are in dire need of additional revenue.

Sincerely yours,

A. H. COLLINS

State Superintendent of Education

AHC:JM

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 18:

Section 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning: (a). The term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b). The term "department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d). The term "tax year" or "taxable year" means the calendar year. (e). The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. (f). The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property (and including the proceeds from the sale of any properly handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account

of losses; provided that cash discounts allowed and taken on sales shall not be included, and "gross proceeds of sales" shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit. (g). The word "taxpayer" means any person liable for taxes hereunder. (h). The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in, (not including, however, interest, discounts, rentals of real estate or royalties) and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever and without any deductions on acccunt of losses. (i). The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (j). The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as

wholesales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (k). The word "business", as used in this Act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a). Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever,

including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debts or stocks), an amount equal to two per cent (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. (b). Upon every person, firm or corporation engaged, or continuing within this State, in the business of conducting, or operating, places of amusement and/or entertainment, billiard and pool rooms, bowling alleys, amusement devices, musical devices, theaters, opera houses, moving picture shows, vaudevilles, amusement parks, athletic contests, including wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games, (including athletic contests conducted by or under the auspices of any educational institution within this state, or any athletic association thereof, or other association whether such institution or association be a denominational, a state, a county, or a municipal institution or association or a state, county, or city school, or other institution, association or school), skating rinks, race tracks, golf courses, or any other place at which any exhibition,

display, amusement or entertainment is offered to the public or place or places where an admission fee is charged, including public bathing places, public dance halls of every kind and description within the State of Alabama, an amount equal to two per cent (2%) of the gross receipts of any such business. (c). Upon every person, firm or corporation engaged or

continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one-per cent of the gross proceeds of the sale of said automotive vehicle.

Section V. EXEMPTIONS: There are however exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a). The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b). The gross proceeds of sales of tangible personal property to the State of Alabama to the counties within the State, and to incorporated municipalities of the State of Alabama. ******

Section VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month

in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department, a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. Provided, however, that when the total tax for which any person liable under this Act does not exceed ten (10) dollars, for any month, a quarterly return and remittance in lieu of the monthly returns may be made on or before the 20th day of the month next succeeding the end of the quarter for which the tax is due, when specially authorized by the Department of Revenue, and under such rules and regulations as may be prescribed. The Department of Revenue, for good cause, may extend the time for making any return required under the provisions of this act, but the time for filing any such return shall not be extended for a period greater than thirty days from the date such return is due to be made.

Section VII. Any person taxable under this Act, having cash and credit sales, may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collection of such credit sales shall have been made.

Section XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five ($25.00) dollars, nor more than five hundred ($500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

Section XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty ($50.00) dollars, nor more than five hundred ($500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months.

Each month of failure to make such reports shall constitute a separate offense, and each refusal of a written demand of the Department to examine, inspect or audit such records shall constitute a separate offense.

Section XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) per cent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one (½ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

Section XIV. Any person who fails to pay the tax herein levied within the time required by this Act shall pay, in addition to the tax, a penalty of ten (10%) per cent of the amount of tax due, together

with interest thereon at the rate of one-half of one (½ of 1%) per cent per month, or fraction thereof, from the date at which the tax herein levied became due and payable, such penalty and interest to be assessed and collected as a part of the tax.

Section XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten (10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one (½ of 1%) per cent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a wilful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) per cent of the tax. Provided that upon appeal such action shall be reviewable.

Section XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgment of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. If upon such hearing the Department finds the amount due to be different from that originally assessed, it shall make the assessment final in the correct amount and in all cases shall notify the taxpayer of the assessment as finally fixed. Provided a notice by United States mail addressed to the taxpayer's last known place of business shall be sufficient. Any assessment made by the Department shall prima facie be correct upon appeal.

Section XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made, he may appeal in all respects in the same manner provided by Act. No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final.

Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

Section XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue Laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty ($50.00) Dollars nor more than One Hundred ($100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both

such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

Section XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this act.

Section XXIX. The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided.

Section XXXI. The administration of this act is vested in and shall be exercised by the State Department of Revenue, except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be under the jurisdiction and supervision of the Department, and the Department may require the assistance of, and act through the prosecuting attorney, or deputy solicitor of any county, or any circuit solicitor, and the Attorney General of the State, and legal counsel of the State Department of Revenue. The Department shall appoint as needed such

agents, clerks, and stenographers as may be necessary to enforce provisions of this act who shall serve at the will of the Commissioner of the Department, and who shall perform such duties as may be required, and such duly appointed and qualified agents are authorized to act for the Department as it may direct and as is authorized by law. Each such agent shall execute a bond in the sum of five thousand ($5,000.00) dollars for the faithful performance of his duties.

Section XXXII. The Department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

Section XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no discount shall be authorized or allowed upon any taxes which are not paid before delinquency as in this Act provided.

Section XXXIX. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause

or clauses, phrase or phrases, word or words of this Act shall be held to be unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this Act. It is hereby declared to be the legislative intent that this Act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section, or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

> SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such

structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat.

2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * * *

MILITARY POSTS

* * * * * * * * * emergency construction, $47,976,962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1339; 40 U. S. C. 255); * * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong., 3d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisidiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property

sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.